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Attorneys for Trustee

UNITED STATES BANKRUPTCY COURT
 DISTRICT OF IDAHO

In Re:)	
)	
GERALD & ONA LINDSEY, d/b/a)	Case No. 03-21652
SEARCHLIGHT TRUST and RIVER)	
MOUNTAIN RANCH,)	
)	AP Case No. 04-6098
Debtors.)	
)	
<hr/>)	
FORD ELSAESSER, Chapter 7 Trustee,)	TRUSTEE'S RESPONSE TO
)	MOTION TO SET ASIDE ORDER
Plaintiff,)	APPROVING COMPROMISE
)	
vs.)	
)	
MICHAEL IOANE; et. al.,)	
)	
Defendants.)	
<hr/>)	

COMES NOW, Plaintiff, Ford Elsaesser, Chapter 7 Trustee, by and through the undersigned counsel of ELSAESSER JARZABEK ANDERSON MARKS ELLIOTT & MCHUGH, CHTD., in response to Motion to Set Aside Order Approving Compromise filed on behalf of Nevak Mining Limited (hereinafter "Nevak").

ORIGINAL *12/16*

1. Nevak's Motion Should Be Denied For Failure To Comply With Local Rules.

Local Rule 7.1(b)(1) requires that every motion, "other than a routine or uncontested matter, must be accompanied by a separate brief, not to exceed twenty (20) pages, containing all the reasons and points and authorities relied upon by the moving party." Nevak filed a motion, but no accompanying brief. The Court, and the parties, are left without any clear indication as to the basis for the motion. Based upon Nevak's failure to comply with the Local Rule, the motion should be denied.

2. Rule 60(b) Does Not Apply.

Presumably, Nevak bases its motion on Rule 60(b), Federal Rules of Civil Procedure, which allows for relief from an order based on mistake, inadvertence, excusable neglect, etc. However, in order for Rule 60(b) to apply, it must be a *final order*:

To be eligible for Rule 60(b) relief, an order must be final. "On motion and upon such terms as are just, the court may relieve a party . . . from a *final* judgment, order or proceeding . . ." Fed. R. Civ. P. 60(b) (emphasis supplied). *See Paul Revere Variable Annuity Ins. Co. v. Zang*, 248 F.3d 1, 4 (1st Cir. 2001); *United States v. Baus*, 834 F.2d 1114, 1118 (1st Cir. 1987) ("By its own terms, Rule 60(b) applies only to final judgments."). "We recognize that finality is [to be] given a flexible interpretation in bankruptcy, . . . where necessary to accommodate concerns unique to the nature of bankruptcy proceedings." *Estancias La Ponderosa Dev. Corp. v. Harrington (In re Harrington)*, 992 F.2d 3, 5 (1st Cir. 1993) (internal quotations and citations omitted). Although finality is elastic, "a bankruptcy court order is not appealable 'unless it conclusively determines a discrete dispute within the larger case.'" *Fleet Data* 218 B.R. at 648 (quoting *In re Harrington*, 992 F.2d at 5). If not appealable, an order is not ripe for Rule 60(b) relief. *Baus*, 834 F.2d at 1119 ("The stated test for finality under Rule 60(b) . . . is whether the judgment is appealable.").

In Re Motorcycle Co., Inc., 289 B.R. 269, 279-280 (1st Cir. BAP 2003). A bankruptcy court's approval of a settlement order that brings to an end litigation between parties is a "final" order. *See In re Cajun Electric Power Coop., Inc.*, 119 F.3d 349, 354 (5th Cir. 1997); *In re West Texas Marketing Corp.*, 12 F.3d 497, 501 (5th Cir. 1994); *In re Medomak Canning*, 922 F.2d 895, 900

(1st Cir. 1990). The order challenged here is not a final order in that it does not bring to an end the litigation between Nevak and the Trustee. Rather, it resolves on a temporary basis issues relating to the temporary restraining order while allowing both parties to proceed under understood and stipulated conditions. Further, it is also not an appealable order. Therefore, Rule 60(b) would not be available for the purpose of setting aside the Court's prior order entered pursuant to stipulation by the parties.

3. The Error In The Order Should Be Corrected Pursuant To Rule 60(a), Federal Rules of Civil Procedure.

The apparent error that Nevak complains of relates to language in the Stipulation, which states as follows:

4. Nevak agrees to release any claim to the \$32,237.87 removed from Nevak's bank account on March 15, 2004, and agrees that those funds originated from Equitable Financial Services and American Lending Services, which funds are claimed by the Trustee as property of the bankruptcy estate, and Nevak and the Trustee agree that if Equitable Financial Services and American Lending Services are found to be alter egos or nominees for Debtors Gerald and Ona Lindsey, and if it is found that the \$32,237.87 can be traced to funds loaned to Nevak by Equitable Financial Services and American Lending Services, the \$32,237.87 will be applied to the loan balances as of the date of removal from Nevak's bank account;

[Docket No. 59, Adv. Pro., ¶ 4] The Motion for Approval of Compromise Settlement and Notice of Hearing filed in the *Lindsey* bankruptcy case refer to the Stipulation entered into by the parties, which was attached as Exhibit 1 to that motion. [*Lindsey* Bankruptcy Case, Docket No. 89, ¶ (a)]

After a hearing was held on the Motion to Compromise, and no objections having been made, the Court entered the Order Approving Compromise Settlement. [*Lindsey* Bankruptcy Case, Docket No. 100] An unintentional error was made by counsel for the Trustee in drafting the order, which replaces Equitable Financial Services with National Holding Trust:

4. Nevak releases any claim to the \$32,237.87 removed from Nevak's bank account on March 15, 2004, and these funds are property of the bankruptcy estate, and Nevak and the Trustee agree that if National Holding Trust and American Lending Services are found to be alter egos or nominees for Debtors Gerald and Ona Lindsey, and if it is found that the \$32,237.87 can be traced to funds loaned to Nevak by National Holding Trust and American Lending Services, the \$32,237.87 will be applied to the loan balances as of the date of removal from Nevak's bank account;

Id. at ¶ 4.

Rule 60(a) allows for the correction of clerical mistakes in orders "arising from oversight or omission [which] may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." As long as the court's correction is intended to conform the order to the original intention of the court, the application of Rule 60(a) was proper. *See Robi v. Five Platters, Inc.*, 918 F.2d 1439, 1445 (9th Cir. 1990) (court may amend order canceling trademark to add two additional trademarks; "[a] district court judge may properly invoke Rule 60(a) to make a judgment reflect the actual intentions and necessary implications of the court's decision.")

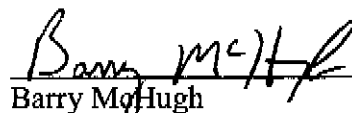
In this case, the Stipulation was entered into between the parties and filed in the adversary case. The settlement was noticed up appropriately for hearing, and after no objections were raised, the Court issued the order. But for the clerical mistake regarding the substitution of National Holding Trust for Equitable Financial Services, it would have been as intended by the parties and the Court. Rule 60(a) is appropriately applied in order to correct the order and issue an amended order. Upon approval by the Court, the Trustee shall submit such an amended order for approval.

CONCLUSION

Nevak has not complied with the Local Rule requiring a brief to be filed along with any motion. Not surprisingly, Nevak has also provided no legal basis for the Court to set aside its prior order. Rather, a clerical mistake, which can be corrected pursuant to Rule 60(a), Federal Rules of Civil Procedure, should be corrected through an amended order. The Trustee urges the Court to reject Nevak's motion and issue the amended order as recommended above.

DATED this 13TH day of September, 2004.

ELSAESSER JARZABEK ANDERSON
MARKS ELLIOTT & McHUGH

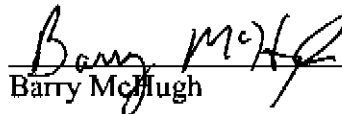
A handwritten signature in cursive script, appearing to read "Barry McHugh", is written over a horizontal line.

Barry McHugh
Attorney for Trustee

CERTIFICATE OF SERVICE

I hereby certify that on the 13TH day of September, 2004, a true and correct copy of the foregoing TRUSTEE'S RESPONSE TO MOTION TO SET ASIDE ORDER APPROVING COMPROMISE was served upon the following via U.S. Mail, first class, postage prepaid, as well as facsimile where indicated.

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